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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Dewey Data LLC

Serial No. 76/219,048

Thomas I. Rozsa of Rozsa & Chen LLP for Dewey Data LLC.

Monique C. Miller, Trademark Examining Attorney, Law Office
108 (David Shallant, Managing Attorney).

Before Hanak, Walters and Bucher, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Dewey Data LLC seeks registration on the Principal
Register for the mark DITTOCONNECTOR for "computer hardware
and computer software which are both utilized for computer
hard drive protection, duplication and recovery," in
International Class 9.¹

This case is now before the Board on appeal from the
final refusal to register based upon Section 2(d) of the
Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining

¹ Application Serial No. 76/219,048 was filed on March 2, 2001
based upon applicant's allegation of a *bona fide* intention to use
the mark in commerce.

Attorney has held that applicant's mark, when used in connection with the identified goods, so resembles the mark DITTO which is registered by Iomega Corporation for "computer memory storage devices, namely tape drives; computer memory storage controllers; computer memory storage tape cartridges," also in International Class 9,² as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney have fully briefed this appeal but applicant did not request an oral hearing.

We affirm the refusal to register.

Applicant contends that the Trademark Examining Attorney has unfairly dissected its mark rather than considering the mark in its entirety; that the goods of applicant are totally different from those of registrant, and as a result, that the trade channels are different; and that DITTO-formative marks are weak in the computer field.

By contrast, the Trademark Examining Attorney takes the position that the respective marks create substantially similar overall commercial impressions; that the goods are closely related; and that applicant has failed to demonstrate the weakness of DITTO-formative marks in the computer field.

² Registration No. 2,192,936, issued on October 6, 1998.

Our determination under Section 2(d) is based upon an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Despite applicant's arguments to the contrary, we find that applicant's goods (computer hardware and software designed for the protection, duplication and recovery of computer hard drives) are at the very least, closely related to registrant's goods (Iomega's computer memory storage devices). Among the third-party registrations placed in the record by the Trademark Examining Attorney is one for the word mark Iomega (stylized)³ having an identification of

³ Registration No. 2,355,180 for the mark **iomega** for goods identified as: "**Computer memory storage devices**, namely optical and magneto-optical disk, drives, **tape drives** and magnetic disk drives, and blank magnetic disks, tapes and cartridges, and **computer memory storage cartridges; computer memory storage controllers**; computer software for use with computer peripherals or for use in recording and playback of audio, computer disaster **recovery, file backup and retrieval**; computer hardware and software for use in digital audio and video recording and editing; video capture card; small computer system interface (scsi) controller; cable connection box; computer and peripheral connection cables; user manuals sold as a unit with any of the foregoing goods," in International Class 9. [emphasis supplied]

goods that blends characterizations of applicant's identification of goods with characterizations of registrant's current identification of goods. While the identification in the recited registration ("computer memory storage devices, namely tape drives; computer memory storage controllers; computer memory storage tape cartridges") does not enumerate the reason one would purchase registrant's tape drives, controllers and cartridges, among the reasons for such a purchase is routinely to backup the files located on one's hard drive and to ensure system recovery in the event of a hard drive failure. If registrant's goods were actually used in this manner, the goods herein would be legally identical. While we cannot be sure that the respective products operate in the same manner, share any of the same media, are compatible with the same computer systems or are compatible with each other, nonetheless, for our purposes, these systems are similar in their general purpose and overall application. Accordingly, whether competitive and legally identical, or just closely-related goods, we find that applicant's identified computer products are sufficiently related to registrant's goods identified by its DITTO marks that confusion is likely if these respective lists of goods are identified by substantially similar marks.

Turning to the du Pont factors dealing with the similarity or dissimilarity of established, likely-to-continue trade channels as well as the conditions under which and buyers to whom sales are made, we must presume that applicant's goods and registrant's goods will move through all of the normal channels of trade to all of the usual purchasers for goods of the type identified. See Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 UPSQ2d 1813, 1815, (Fed. Cir. 1987). Hence, in looking to these two related du Pont factors, we conclude that the channels of trade will be overlapping, if not identical, and classes of purchasers will be the same.

Accordingly, then, we turn to the question of whether the respective marks are sufficiently similar such that their use in connection with these closely related computer products would be likely to cause confusion.

The Examining Attorney has cited to the well established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark ... provided the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 732 F.2d 1056, 224

USPQ 749, 751 (Fed. Cir. 1985). In any case, the proper test for determining the issue of likelihood of confusion is the similarity of the general commercial impression engendered by the marks, not a side-by-side comparison. See Johann Maria Farina Gegenuber Dem Julichs-Platz v. Chesebrough-Pond, Inc., 470 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972).

As noted by the Trademark Examining Attorney, applicant has appropriated registrant's entire mark and simply added the word CONNECTOR to the end of it. Moreover, when comparing the marks as to sound and appearance, it is often the first part of a mark that is most likely to be impressed upon the mind of a purchaser and subsequently remembered. We find that would be the case herein. Presto Products Inc. v. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988).

Applicant argues that the cited mark, DITTO, is a weak mark for computer devices and, therefore, should be afforded little protection. By contrast, the Trademark Examining Attorney contends that the word DITTO - the whole of registrant's mark and the stronger component of applicant's mark - is a strong mark as applied to these devices.

Despite applicant's arguments, there is no evidence in the record that consumers or computer technicians use the word "Ditto" to describe any specific characteristic,

quality, feature, use, purpose or other aspect of computer devices or related goods.⁴ Therefore, if that issue were before us, we would find that the word "Ditto" is strong enough to serve as a distinguishing element of registrant's mark. See Gillette Canada Inc. v. Ranir Corporation, 23 USPQ2d 1768, 1773 (TTAB 1992).

In any event, that issue is not squarely before us. We specifically note that the cited registered mark is on the Principal Register with no claim of acquired distinctiveness under Section 2(f) of the Trademark Act. Hence, the cited certificate of registration is, of course, entitled to the statutory presumptions under Section 7(b) of the Act (e.g., it is *prima facie* evidence of the validity of the registration and of registrant's exclusive right to use the mark in connection with the goods specified). Applicant's argument that the registered mark is entitled to severely limited protection actually appears to be a collateral attack on the validity of the registration that cannot be entertained in the context of an *ex parte* proceeding.

Certainly, as to the connotation of the marks DITTO and DITTOCONNECTOR as applied to these goods, to the extent that

⁴ We can take judicial notice of the definition of the word "Ditto" as "A duplicate or copy" The American Heritage Dictionary of the English Language (1975), and recall that the involved devices herein are designed, *inter alia*, to duplicate electronic computer files.

consumers will make a logical connection between the word "Ditto" and the duplicating function of the goods, this is an argument for finding that the respective marks do indeed create the same overall commercial impression.

Of course, applicant's mark also includes the word CONNECTOR, and we have considered this portion of applicant's mark as well in comparing the marks in their entireties. It is in this context we recall that the respective identifications of goods herein list computer hardware for duplication, tape drives, etc. We assume this could include peripheral devices that are external to the computer, or that may well be installed internally. In either case, these computer devices are of value to the user only to the extent that they are linked to the computer with a "connector." As requested by the Trademark Examining Attorney, we take judicial notice of two separate dictionary entries for the word "connector."⁵ Any documentation for

⁵ The Trademark Examining Attorney attached two dictionary entries to her appeal brief. Inasmuch as the Board may take judicial notice of dictionaries, we refer to these entries:

Connector: Any plug and socket that links two devices together. Although taken for granted and rarely in the limelight, connectors are a huge industry, and the quality of these components is more critical than most people would imagine. When not designed or constructed properly, they often become the weakest element in an electronic system." Computer Desktop Encyclopedia, (Version 15.4, 2002).

Connector: Any plug, socket or wire that links two devices together." The Computer Glossary, (7th Edition, 1995).

registrant's devices and for applicant's devices will necessarily make frequent references to the relevant "connectors" required to make these devices functional.

During the prosecution of this application, successive Trademark Examining Attorneys have variously labeled the word "connector" as "suggestive" (Final refusal of May 15, 2002) and "descriptive" (Trademark Examining Attorney's appeal brief, p. 5). However, without needing to decide on which side of the line to place the word "connector" in the context of these computer devices, it is clear that the term is *not arbitrary* as applied to these goods. Hence, in analyzing the two separate components of applicant's mark, we find that this additional word at the tail end of applicant's mark is unlikely sufficiently to distinguish it from registrant's mark. As suggested earlier, due to the fallibility of memory and the consequent lack of perfect recall by members of the consuming public, in determining whether confusion as to source or sponsorship is likely, the proper emphasis is on the likely recollection of the average customer, who normally retains a general rather than a specific impression of trademarks or service marks. Spoons Restaurants, Inc. v. Morrison, Inc., 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992); In re United States Distributors, Inc., 229 USPQ 237, 239 (TTAB

1986); and In re Steury Corporation, 189 USPQ 353 (TTAB 1975).

Considering the marks DITTO and DITTOCONNECTOR in their entireties, we are of the view that they are similar in sound and appearance, and are substantially similar in connotation. Hence, when compared in their entireties, the two marks create similar overall commercial impressions.

Applicant makes much of the du Pont factor focused on the number and nature of similar marks in use on similar goods. Specifically, applicant argues that the United States Patent and Trademark Office "is not granting exclusivity to the trademark 'DITTO' to any one company" (applicant's appeal brief, p. 2) and that the United States Patent and Trademark Office "is considering 'DITTO' by itself to be sufficiently generic that it is permitting competing products to be registered with the same trademark 'DITTO' as long as the products are different even though they are in the computer field" (applicant's appeal brief, p. 4).

Applicant's argument in support of this position is based on two earlier-pending applications and, as such, is not persuasive. Accordingly, on this record, applicant has failed to demonstrate that the cited mark is weak as applied to these computer devices, or that it has in any way been

treated unfairly with this refusal under Section 2(d) of the Act.

In conclusion, inasmuch as the goods are closely related, if not legally identical, we assume that the computer products of registrant and of applicant will move in similar channels of trade to the same class of consumers. The marks DITTO and DITTOCONNECTOR create similar overall commercial impressions, particularly as applied to these goods. Based upon these key considerations, we conclude that consumers would be likely to mistakenly believe that registrant's computer memory storage devices, sold under the mark DITTO, and applicant's computer hardware and software devices for the protection, duplication and recovery of computer hard drives, sold under the mark DITTOCONNECTOR, originated with, or are somehow associated with, or sponsored by, the same entity.

Decision: The refusal to register applicant's mark under Section 2(d) of the Act is affirmed.